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AGING

April 1, 2020

Jovita Carranza
Administrator
U.S. Small Business Administration
409 3rd St., SW
Washington, D.C. 20416

Dear Administrator Carranza:

As you undertake the critical task of helping nonprofits access the funds Congress made available through the newly enacted Paycheck Protection Program, I write to draw your attention to how this program affects small religious nonprofits. This program applies more broadly to religious nonprofits than preexisting programs, and the Small Business Administration must be careful not to violate the constitutional rights of these organizations by treating them with disfavor or by trying to tell them who their affiliates are.

First, Congress chose to make this program more inclusive. Other SBA programs, such as section 7(a) loans, exclude some organizations because of their principal religious purpose. In sharp contrast, the Paycheck Protection Program instructs lenders to consider *only* organization size, whether the organization was operational on February 15th, and whether the organization paid salaries and payroll taxes at that time. Lenders cannot disqualify organizations because of their principal purpose.

Second, this more inclusive program will require vigilance by the SBA to avoid infringing the constitutional rights of these organizations. The Paycheck Protection Program applies to “small” organizations—by default, those with 500 or fewer employees.¹ But the definition of “small” is not the same in every industry, so the program encourages the SBA to continue adopting regulations that alter that size standard for specific industries. For example, the SBA has already altered the size standard for tire manufacturers to 1,500—three times the default standard.

The SBA should adopt a higher size standard for religious organizations to recognize the distinct set of roles these organizations perform. Unlike other small nonprofits, religious organizations often operate in more than one industry. For example, a single entity might operate a church, school, foster care center, publishing house, job training center, and soup

¹ As the Department of Labor has already clarified, I understand this default standard to refer to persons employed in the United States, not abroad (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>). I would appreciate clarification about whether the SBA has the same understanding.

kitchen. Likewise, because employees at religious institutions typically accept compensation far below the market rate, religious institutions often use the same amount of resources to employ far more people. A religious organization may employ 800 people for the same cost as other companies employ 500.

The default 500-person size standard often will not accurately reflect a religious organization's need for payroll assistance during this global epidemic. Indeed, it may be more appropriate to treat each segment of a religious nonprofit—for example, a foster care center, church, and school—as separate, distinct entities. And because religious nonprofits disproportionately employ more people relative to their finances, giving loans to as many religious nonprofits as possible may be the best way of maximizing the number of people who stay on payroll.

Three years ago, in *Trinity Lutheran v. Comer*, the Supreme Court reaffirmed the constitutional rule that the government may not disfavor an organization with respect to a generally available benefit simply because the organization is religious. Failure to consider an appropriate size standard for religious organizations after having already done so for hundreds of industries would be no different from targeting religious organizations for special disfavor. Religious institutions should not be penalized for the unique role they perform.

Similarly, in determining whether an entity satisfies the size standard, the SBA should not purport to tell religious organizations who their affiliates are. Doing otherwise would raise substantial constitutional concerns because religious organizations are diverse and affiliation decisions often are made for ecclesiastical, doctrinal, or congregational reasons. Recognizing this problem, federal policy already exempts most religious organizations from having to identify their affiliates. Ordinary nonprofits must identify their related organizations under Schedule R of Form 990. But Congress chose to exempt many religious organizations from having to file that form. Because of these constitutional principles, any individual religious entity that meets the size standard and other qualifications should receive funds under the Paycheck Protection Program without the SBA or lenders considering the affiliate regulations, 13 C.F.R. § 121.103.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh Hawley", with a stylized, cursive script.

Josh Hawley
United States Senator